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DEPARTMENT OF DEFENSE

Defense Acquisitions Regulations System

48 CFR Parts 225 and 252

RIN 0750-AH70

Defense Federal Acquisition Regulation Supplement; Defense Trade Cooperation Treaty with the United Kingdom (DFARS 2012-D034)

AGENCY: Defense Acquisition Regulations System; Department of Defense (DoD).

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement requirements of the Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation (the Treaty) and the Security Cooperation Act of 2010 regarding export control regulations between the United States and the United Kingdom. The Treaty and statute establish an Approved Community that includes members of the U.S. Government and the government of the United Kingdom.

DATES: Effective Date: [Insert date of publication in the FEDERAL REGISTER.]

Comment date: Comments on the interim rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by DFARS Case 2012-D034, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2012-D034" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2012-D034." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2012-D034" on your attached document.

- o Email: dfars@osd.mil. Include DFARS Case 2012-D034 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: (Insert case manager's name), OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days

for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6106; facsimile 571-372-6101.

SUPPLEMENTARY INFORMATION:

I. Background

This rule streamlines the export control regulations between the United States and the United Kingdom under specified circumstances.

The U.S. Government controls exports of defense articles, technical data, and defense services. The governing law is the Arms Export Control Act (AECA) (22 U.S.C. 2778 et seq.) and implementing regulations in the International Traffic in Arms Regulations (ITAR) (22 CFR 120-130).

Under the ITAR, the Department of State manages an export licensing system in which numerous government approvals are often necessary for companies to hold discussions about potential projects, pursue joint activities, ship hardware, or transfer know-how to one another, and even sometimes to transfer engineers and other company employees from one country to another. This process can be challenging and time consuming for U.S. exporters and for foreign firms in their supply chains.

The U.S. concluded the Treaty with the United Kingdom to

enable their militaries, security authorities, and their approved industries to exchange defense articles, technical information, and defense services more freely. The Treaty establishes exemptions for certain exports and transfers that meet the Treaty requirements. Other exports and transfers remain governed by AECA and the ITAR.

The Treaty and implementing arrangements with the United Kingdom may be accessed at

<http://www.state.gov/t/pm/rls/othr/misc/92770.htm>.

The implementing legislation is in Title I of Pub. L. 111-266, the Security Cooperation Act of 2010.

The Senate conditions upon ratification are at

<http://www.govtrack.us/congress/billtext.xpd?bill=s111-3847>.

The U.S. Department of State regulations implementing the Treaty with the United Kingdom are at 22 CFR part 120.

The Treaty establishes an Approved Community that includes members of the U.S. Government and the government of the United Kingdom, including various Ministries, Departments, and Agencies, as well as selected defense and security companies and facilities. Exports of most U.S. defense articles, including technical data and defense services, are generally permitted to enter and to move freely within this community, without the need for government approvals and licenses – provided that all persons comply with all other statutory and regulatory requirements concerning the import of defense

articles and defense services or the possession or transfer of defense articles, – when in support of –

- Combined U.S.-U.K. military or counterterrorism operations;
- U.S.-U.K. cooperative security and defense research, development, production, and support programs;
- Mutually agreed to security and defense projects that are for U.K. Government use only; and
- U.S. Government end use.

Under the Treaty, instead of a U.S. exporter preparing and requesting U.S. Department of State approval of an export license or Technical Assistance Agreement for a project, which would normally take around 45-60 days, the exporter will verify information on the U.S. Department of State website that–

- The U.K. industry member is a member of the Approved Community;
- The project is on the list of approved projects and items are for U.S. Government end use; and
- The defense article is not on the Exempted Technology List.

If the members of the United States Community and United Kingdom Community, the project, and the technology are verified, then the U.S. exporter and the U.K. member may proceed without export licenses.

In addition to checking the above three lists, an exporter using the Treaty also must comply with any applicable related ITAR requirements and 22 CFR 126.17(g) and other applicable U.S. laws and regulations. These requirements include marking and recordkeeping to ensure that export-controlled items are recognized as such and handled accordingly. Similarly, DFARS 225.7902 implements requirements that relate to exports that, for example, a prospective contractor may make under a DoD solicitation or that a contractor may make in performance of a DoD contract.

II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

DoD does not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule does not impose burdens on small businesses. Small businesses that are exporters will benefit from being able to use the streamlined treaty process to make exports that are associated with responding to DoD solicitations and performance of DoD contracts. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The objective of the rule is to streamline the export control regulations between the United States and the United Kingdom under specified circumstances. The legal basis for the rule is the Security Cooperation Act of 2010 (Pub. L. 111-266), enacted October 8, 2010.

Although this rule adds a representation that requires the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, the net effect will be to significantly streamline and reduce paperwork requirements between the United States and the United Kingdom under the process set forth in the Treaty as implemented by the ITAR by no longer requiring individual export control licenses in certain circumstances within the Approved Community. In short, one representation per offeror will streamline the current process.

The great majority of industry members that comprise the Approved Community are not small businesses due to the specialized knowledge of export control regulations and the cost involved in compliance. Therefore, the cost is anticipated to be less than five million dollars, but will accrue a net cost savings by streamlining the requirements of industry compared to the present export control licensing procedures.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

This rule implements the Treaty and statute and DoD is not aware of any alternative methods of achieving the objectives of the rule. Furthermore, the net impact of the rule is expected to be beneficial to small businesses.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2012-D034), in correspondence.

IV. Paperwork Reduction Act

The rule contains information collection requirements that require the approval of the Office of Management and

Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). OMB has cleared this information collection requirement under OMB Control Number 0704-0488, titled: Defense Trade Cooperation Treaty with the United Kingdom (DFARS 252.225).

The annual reporting burden is estimated as follows:

Respondents: 110

Responses per respondent: 1

Total annual responses: 110

Preparation hours per response: 0.1

Total response burden hours: 11

This rule will result in a significantly streamlined process and reduced paperwork requirements overall between the United States and the United Kingdom under the process set forth in the Treaty as implemented by the ITAR by no longer requiring individual export licenses within the Approved Community. In short, one representation per offeror will streamline the current process.

B. Request for Comments Regarding Paperwork Burden.

Written comments and recommendations on the information collection, including suggestions for reducing this burden, should be sent not later than **[Insert date 60 days after date of publication in the FEDERAL REGISTER]** to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, or email Jasmeet_K_Seehra@omb.eop.gov, with a copy to

the Defense Acquisition Regulations System, Attn: (Ms. Amy Williams), OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the DFARS, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

To request more information on this information collection or to obtain a copy of the information collection and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: (Ms. Amy Williams), OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060, or email dfars@osd.mil. Include DFARS Case 2012-D034 in the subject line of the message. Requesters may obtain a copy of the supporting statement from

the point of contact specified herein. Please cite OMB Control Number 0704-0488, Defense Trade Cooperation Treaty with the United Kingdom (DFARS 252.225), in all correspondence.

V. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the Department of State final rule implementing the Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation (Treaty Doc. 110-7) and making other updates to the ITAR became effective on April 13, 2012 (77 FR 23538 dated April 19, 2012). Expedited implementation of an interim DFARS rule is based upon the DFARS' integral ties with the ITAR and the National Industrial Security Program Operating Manual (NISPOM). The NISPOM and DFARS regulations operationalize the ITAR guidance for members of the United States Community and United Kingdom Community in the Approved Community responsible for most of the operational functions.

However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 225 and 252

Government procurement.

Ynette R. Shelkin

Editor, Defense Acquisition Regulations System

Therefore, 48 CFR parts 225 and 252 are amended as follows:

1. The authority citation for 48 CFR parts 225 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 225—FOREIGN ACQUISITION

2. Add subpart 225.79 to read as follows:

Subpart 225.79—EXPORT CONTROL

Sec.

225.7900 Scope of subpart.

225.7901 [Reserved]

225.7902 Defense Trade Cooperation Treaty with the United Kingdom.

225.7902-1 Definitions.

225.7902-2 Purpose.

225.7902-3 Policy.

225.7902-4 Procedures.

225.7902-5 Solicitation provision and contract clause.

Subpart 225.79—EXPORT CONTROL

225.7900 Scope of subpart.

This subpart implements the requirements of the Security Cooperation Act of 2010 (Pub. L. 111-266) and the Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation (the Treaty) regarding export control. See PGI 225.7902 for additional information.

225.7901 [Reserved]

225.7902 Defense Trade Cooperation Treaty with the United Kingdom.

This section implements the Treaty and the Implementing Arrangement for DoD solicitations and contracts that authorize prospective contractors and contractors to use the Treaty to respond to DoD solicitations and in the performance of DoD contracts.

225.7902-1 Definitions.

Approved Community, defense articles, export, Implementing Arrangement, qualifying defense articles, transfer, Treaty, and U.S. DoD Treaty-eligible requirements are defined in DFARS clause 252.225-7047, Exports by Approved Community Members in Performance of the Contract.

225.7902-2 Purpose.

The Treaty permits the export of certain U.S. defense articles, technical data, and defense services, without U.S. export

licenses or other written authorization under the International Traffic in Arms Regulations (ITAR) into and within the Approved Community, as long as the exports are in support of purposes specified in the Treaty. All persons must continue to comply with statutory and regulatory requirements outside of DFARS and ITAR concerning the import of defense articles and defense services or the possession or transfer of defense articles, including, but not limited to, regulations issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives found at 27 C.F.R. Parts 447, 478, and 479, which are unaffected by the Defense Trade Cooperation Treaty between the United States and the United Kingdom. The Approved Community consists of U.S. entities that are registered with the Department of State and are eligible exporters, the U.S. Government, and certain governmental and commercial facilities in the United Kingdom that are approved and listed by the U.S. Government. See PGI 225.7902-2 for additional information.

225.7902-3 Policy.

DoD will facilitate maximum use of the Treaty by prospective contractors responding to DoD solicitations and by contractors eligible to export qualifying defense articles under DoD contracts in accordance with 22 CFR 126.17(g).

225.7902-4 Procedures.

(a) For all solicitations and contracts eligible for Treaty coverage (see PGI 225.7902-4(1)), the program manager shall

identify in writing and submit to the contracting officer prior to issuance of a solicitation and prior to award of a contract—

(1) The qualifying Treaty Scope paragraph (Article 3(1)(a), 3(1)(b), or 3(1)(d)); and

(2) The qualifying defense article(s) using the categories described in 22 CFR 126.17(g).

(b) If applicable, the program manager shall also identify in writing and submit to the contracting officer any specific Part C, Treaty-exempted technology list items, terms, and conditions for applicable contract line item numbers (See PGI 225.7902-4(2)).

225.7902-5 Solicitation provision and contract clause.

(a) Use the provision at 252.225-7046, Exports by Approved Community Members in Response to the Solicitation, in solicitations containing the clause at 252.225-7047.

(b)(1) Use the clause at 252.225-7047, Exports by Approved Community Members in Performance of the Contract, in solicitations and contracts when—

(i) Export-controlled items are expected to be involved in the performance of the contract and the clause at 252.204-7008 is used; and

(ii) At least one contract line item is intended to satisfy a U.S. DoD Treaty-eligible requirement.

(2) The contracting officer shall complete paragraph (b) of the clause using information the program manager provided as required by 225.7902-4(a).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Add section 252.225-7046 to read as follows:

252.225-7046 Exports by Approved Community Members in Response to the Solicitation.

As prescribed in 225.7902-5(a), use the following provision:

EXPORTS BY APPROVED COMMUNITY MEMBERS IN RESPONSE TO THE
SOLICITATION (MAY 2012)

(a) Definitions. The definitions of Approved Community, defense articles, export, Implementing Arrangement, qualifying defense articles, transfer, Treaty, and U.S. DoD Treaty-eligible requirements in DFARS clause 252.225-7047 apply to this provision.

(b) All contract line items in the contemplated contract, except any identified in this paragraph, are intended to satisfy U.S. DoD Treaty-eligible requirements. Specific defense articles exempt from Treaty eligibility will be identified in those contract line items that are otherwise Treaty-eligible.

CONTRACT LINE ITEMS NOT INTENDED TO SATISFY

U.S. DoD TREATY-ELIGIBLE REQUIREMENTS:

[Enter Contract Line Item Number(s) or enter "None"]

(c) Approved Community members responding to the solicitation may only export or transfer defense articles that specifically respond to the stated requirements of the solicitation.

(d) Subject to the other terms and conditions of the solicitation and the contemplated contract that affect the acceptability of foreign sources or foreign end products, components, parts, or materials, Approved Community members are permitted, but not required, to use the Treaty for exports or transfers of qualifying defense articles in preparing a response to this solicitation.

(e) Any conduct by an offeror responding to this solicitation that falls outside the scope of the Treaty, the Implementing Arrangement, and the implementing regulations of the Department of State in 22 C.F.R. 126.17 (United Kingdom), and 22 C.F.R. 126 Supplement No. 1 (exempted technologies list) is subject to all applicable International Traffic in Arms Regulations (ITAR) requirements, including any criminal, civil, and administrative penalties or sanctions, as well as all other United States statutory and regulatory requirements outside of ITAR.

(f) If the offeror uses the procedures established pursuant to the Treaty, the offeror agrees that, with regard to the export or transfer of a qualifying defense article associated with responding to the solicitation, the offeror shall—

(1) Comply with the requirements and provisions of the Treaty, the Implementing Arrangement, and corresponding regulations (including the ITAR) of the U.S. Government and the government of the United Kingdom;

(2) Prior to the export or transfer of a qualifying defense article—

(i) Mark, identify, transmit, store, and handle any defense articles provided for the purpose of responding to such solicitations, as well as any defense articles provided with or developed pursuant to their responses to such solicitations, in accordance with the Treaty, the Implementing Arrangement, and corresponding United States Government and the government of the United Kingdom regulations including, but not limited to, the marking and classification requirements described in the applicable regulations;

(ii) Comply with the re-transfer or re-export provisions of the Treaty, the Implementing Arrangement, and corresponding United States Government and the government of the United Kingdom regulations, including, but not limited to, the re-transfer and re-export requirements described in the applicable regulations; and

(iii) Acknowledge that any conduct that falls outside or in violation of the Treaty, Implementing Arrangement, and implementing regulations of the applicable government including, but not limited to, unauthorized re-

transfer or re-export in violation of the procedures established in the applicable Implementing Arrangement and implementing regulations, remains subject to applicable licensing requirements of the government of the United Kingdom and the United States Government, including any criminal, civil, and administrative penalties or sanctions contained therein; and

(3) Flow down the substance of this provision, including this paragraph (f)(3), to any subcontractor at any tier intending to use the Treaty in responding to this solicitation.

(g) Representation. The offeror shall check one of the following boxes and sign the representation:

☐ The offeror represents that export(s) or transfer(s) of qualifying defense articles were made in preparing its response to this solicitation and that such export(s) or transfer(s) complied with the requirements of this provision.

Name/Title of Duly Authorized Representative	Date
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☐ The offeror represents that no export(s) or transfer(s) of qualifying defense articles were made in preparing its response to this solicitation.

Name/Title of Duly Authorized Representative	Date
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(End of provision)

4. Add section 252.225-7047 to read as follows:

**252.225-7047 Exports by Approved Community Members in
Performance of the Contract.**

As prescribed in 225.7902-5(b), use the following clause:

EXPORTS BY APPROVED COMMUNITY MEMBERS IN PERFORMANCE OF THE
CONTRACT (MAY 2012)

(a) Definitions. As used in this clause—

Approved Community means the U.S. Government, U.S. entities that are registered and eligible exporters, and certain government and industry facilities in the United Kingdom that are approved and listed by the U.S. Government.

Defense articles means articles, services, and related technical data, including software, in tangible or intangible form, listed on the United States Munitions List of the International Traffic in Arms Regulations (ITAR), as modified or amended.

Export means the initial movement of defense articles from the United States Community to the United Kingdom Community.

Implementing Arrangement means the Implementing Arrangement Pursuant to the Treaty between the Government of the United States of America and the government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation signed on February 14, 2008.

Qualifying defense articles means defense articles that are not exempt from the scope of the Treaty as defined in 22 CFR 126.17(g).

Transfer means the movement of previously exported defense articles within the Approved Community.

Treaty means the Treaty between the Government of the United States of America and the government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation signed at Washington and London on June 21 and 26, 2007.

United Kingdom Community member means a United Kingdom government authority or nongovernmental entity or facility on the United Kingdom Community list accessible at <http://pmddtc.state.gov>.

United States Community means—

(1) Departments and agencies of the U.S. Government, including their personnel, with, as appropriate, security accreditation and a need-to-know; and

(2) Nongovernmental U.S. entities registered with the Department of State and eligible to export defense articles under U.S. law and regulation, including their employees, with, as appropriate, security accreditation and a need-to-know.

U.S. DoD Treaty-eligible requirements means any defense article acquired by DoD for use in a combined military or counterterrorism operation, cooperative research, development, production, or support program, or DoD end use, as described in Article 3 of the Treaty and Sections 2 and 3 of the Implementing Arrangement.

(b) All contract line items in this contract, except any identified in this paragraph, are intended to satisfy U.S. DoD Treaty-eligible requirements. Specific defense articles exempt from Treaty eligibility will be identified in those contract line items that are otherwise Treaty-eligible.

CONTRACT LINE ITEMS NOT INTENDED TO SATISFY

U.S. DoD TREATY-ELIGIBLE REQUIREMENTS:

[Enter Contract Line Item Number(s) or enter "None"]

(c) Subject to the other terms and conditions of this contract that affect the acceptability of foreign sources or foreign end products, components, parts, or materials, Approved Community members are permitted, but not required, to use the Treaty for exports or transfers of qualifying defense articles in performance of the contract.

(d) Any conduct by the Contractor that falls outside the scope of the Treaty, the Implementing Arrangement, and 22 CFR 126.17(g) is subject to all applicable ITAR requirements, including any criminal, civil, and administrative penalties or sanctions, as well as all other United States statutory and regulatory requirements outside of ITAR, including, but not limited to, regulations issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives found at 27 CFR Parts 447, 478, and 479, which are unaffected by the Treaty.

(e) If the Contractor is an Approved Community member, the Contractor agrees that—

(1) The Contractor shall comply with the requirements of the Treaty, the Implementing Arrangement, the ITAR, and corresponding regulations of the U.S. Government and the government of the United Kingdom; and

(2) Prior to the export or transfer of a qualifying defense article, the Contractor—

(i) Shall mark, identify, transmit, store, and handle any defense articles provided for the purpose of responding to such solicitations, as well as any defense articles provided with or developed pursuant to their responses to such solicitations, in accordance with the Treaty, the Implementing Arrangement, and corresponding United States Government and the government of the United Kingdom regulations including, but not limited to, the marking and classification requirements described in the applicable regulations;

(ii) Shall comply with the re-transfer or re-export provisions of the Treaty, this Implementing Arrangement, and corresponding United States Government and the government of the United Kingdom regulations, including, but not limited to, the re-transfer and re-export requirements described in the applicable regulations; and

(iii) Shall acknowledge that any conduct that falls outside or in violation of the Treaty, Implementing

Arrangement, and implementing regulations of the applicable government including, but not limited to, unauthorized re-transfer or re-export in violation of the procedures established in the applicable Implementing Arrangement and implementing regulations, remains subject to applicable licensing requirements of the government of the United Kingdom and the United States Government, including any criminal, civil, and administrative penalties or sanctions contained therein.

(f) The contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts that may require exports or transfers of qualifying defense articles in connection with deliveries under the contract.

(End of clause)

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